JD-07-21
Corpus Christi, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TYR ENERGY LOGISTICS

Respondent

and Case 16–CA–262046

LUIS MIGUEL GARZA, an Individual

Charging Party

Brian Dooley, Esq., and
Phill Melton, *Esq.*,
for the General Counsel.
Michael Walter, pro se
for Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. The 2-day virtual zoom hearing in this case opened on January 5, 2021 and concluded on January 15, 2021. The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by terminating employee Luis Garza for protected concerted activity—discussing safety concerns with fellow employees and bringing those concerns to the attention of management. Respondent filed an answer denying the essential allegations in the complaint. After the conclusion of the trial, the General Counsel and the Respondent filed briefs, which I have read and considered.

Based on the briefs and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a limited liability company with an office and place of business in Corpus Christi, Texas, is engaged in the business of loading rail cars with refined gasoline and diesel fuel. In conducting its business during a representative one-year

period, Respondent provided services valued in excess of $50,000 directly outside the State of Texas. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Background

Respondent leases and operates a facility in Corpus Christi, Texas that includes five miles of rail or industrial track. The facility includes, in addition to the rail lines, an open area that contains a scale house and an administration building, also known as the Human Relations (HR) building. Respondent transfers gasoline and diesel fuel from delivery trucks on to rail cars and ships the product by rail primarily to the Mexican market. Respondent is a completely independent entity from the railroad. Michael Walter is the Chief Operating Officer of Respondent. He is located in Omaha, Nebraska, but keeps in daily contact with his management team at the Corpus Christi site by telephone. The on-site supervisory and management staff at Corpus Christi include Vice-President and Terminal General Manager Mark Henry and Vice-President of Human Relations (HR) and Finance Salena Zapata, who works in the HR or administration building.[1] Only Walter has the authority to hire and fire employees.

Respondent employs some 6 to 8 employees called transloaders, who transfer fuel from the delivery trucks to the rail cars. They normally work in teams of two at distinct rail lines or work sites, some of which are located at a distance from the scale house and the administration building. The employees initially report at about 7:30 to 8 am to the scale house, where they participate in daily safety meetings. They then proceed to their work sites. One work site is within walking distance, but others require someone to take them there and back in a small truck. Once at their work sites, the employees await the delivery trucks, inspect the rail cars, and, when the delivery trucks arrive, unload the product with a hose and transfer the fuel on to the rail car. Then the process is repeated until all available rail cars are filled with fuel.

Julian de la Cruz was a kind of foreman or leadman who checked to see "that the operations are running smoothly" (Tr. 35), answered questions from employees and transported employees to and from their work sites by truck. He also sometimes transmitted communications to and from Respondent's on-site supervisor, Mark Henry. He was not, however, a statutory supervisor and he was not alleged as either a supervisor or an agent by the General Counsel.

Four individuals testified in this case: Michael Walter, Respondent's Chief Operating Officer, and employees Luis Garza, the Charging Party, Fabian Torres and

[1] Almost all of the transcript references mention only Zapata's first name. The first day of the transcript uses Salena; the second day uses Selena. I shall use Salena, the name used on the first day.

Javier Guerra. Garza, whose discharge on June 1, 2020 is the subject of this case, was hired some 4 ½ months before on January 13, 2020. Like Garza, Torres and Guerra were no longer employed by Respondent when they testified. Torres, who was terminated by Respondent in July 2020, worked for Respondent for only a few months (Tr. 110,112, 122). Guerra, who was hired at the end of January 2020, voluntarily quit Respondent's employ on June 1, 2020.

The Events of June 1

The weather in Corpus Christi on the morning of June 1, 2020 included rain, flooding, and lightning strikes. The employees exchanged texts regarding the weather on their way to work. Some of the text messages carried time stamps from shortly before 7 am to shortly after 8 am, the latter after the employees arrived at work. When the employees reported to the scale house on June 1, they continued to discuss the weather and the lightning strikes in the area. After the conclusion of the regular safety meeting, the employees reported to their work sites where they would meet the delivery trucks and unload the product into the rail cars. Throughout the early morning hours, they continued, mostly by text, to discuss the weather, including reference to a report detailing a flood watch and observing the nearby lightning strikes through an app. They also discussed the so-called 30-minute rule, which provides for protection from exposure to lightning when working outside. G.C. Exh. 2, Tr.28-31, 34.

That rule, which is based on an OSHA regulation, permits employees to remain in a safe location under cover for 30 minutes after a nearby lightning strike before returning to work at an outside location. G.C. Exh. 3. The rule is endorsed by Respondent. Its employee handbook provides that it is the employee's responsibility to "[c]omply with OSHA standards and/or applicable state job safety and health standards as written in our safety procedures manual." G.C. Exh. 6. The employees utilized the 30-minute rule when it was deemed appropriate by them at all times on June 1. Respondent did not interfere with the implementation of this rule by the employees. Indeed, it was viewed as a safety protocol by Respondent. Tr. 146-150. Garza himself admitted that Respondent never asked him to work through lightning strikes. Tr.74-75.

Garza's Trips to HR and his Discharge

Garza and Torres were partners at their work site on June 1. Torres testified that he remained at the work site throughout the day. He and Garza started performing their usual tasks after they arrived at the work site. But, in accordance with the OSHA regulation cited above, Torres and Garza shut down for 30 minutes after nearby lightning strikes. They did so three times during the morning prior to about 11 am, when Garza left the work site for good. Garza had left the site briefly once before at about 9 am but returned shortly thereafter. On those two occasions, which are discussed in more detail later in this decision, Garza went to the administration building and spoke to management officials. Torres did not accompany Garza on either trip and there is no evidence that Torres authorized Garza to speak on his behalf. During the lighting strikes, Torres and Garza remained inside one of the vehicles at the work site. Torres

did another 30-minute shutdown that afternoon when Garza was not present. Tr. 118-121. Torres also testified that he followed company protocol or rules by pausing for lightning strikes the required 30 minutes, but that the lightning was not a "bother" for him and that is why he kept working. Tr. 123.[2]

Garza's testimony is similar at least for the first part of the morning. He testified that, while he was at his work site with Torres, he stopped twice for 30-minute shutdowns prior to the first of his two trips to HR, that is, the administration building. Tr. 43-47. At some point that morning, Garza asked de la Cruz to take him to HR in order to ask for time off for a personal matter and to ask for Respondent's EPA (Emergency Plan of Action) document, which he thought would tell him which of Respondent's officials to call and "what to do in certain situations." Tr. 47-48. According to Garza, he arrived at the administration building at about 10 am. Tr. 83, 85. When he arrived there, he spoke to Salena, the HR director, about the matters mentioned above. Tr. 49. Garza was told that the EPA document was not immediately available but would be provided to him later. He remained in the administration building until the latest 30-minute time limit after a lightning strike expired. Then he was taken back to his work site. Tr. 49-50.

The above is based on the essentials of Garza's testimony about his first visit to the administration building. However, I found much of his testimony on this matter somewhat of an exaggeration and unreliable. It was clear to me that he was straining in an attempt to add a concertedness element to his weather complaint by including a reference to Torres. Garza testified that Torres had asked him what he should do about the weather. Tr. 45. But that testimony was not corroborated by Torres and Garza never mentioned Torres in his discussion with Salena. Moreover, Garza initially testified that he asked for the EPA document "so I could know what to do in this situation." Tr. 47. That does not establish what he said to Salena, but, significantly, it does not mention concerns about anyone but himself. Later, however, he testified that he wanted the document so he could know what to do "when it was lightning and thunder outside, so I could better inform my fellow employees of what we could do to remain safe." Tr. 49. Again, he did not testify that he specifically mentioned this purpose to Salena. But, here, in contrast to his earlier testimony, he was attempting to include fellow employees to enhance the litigation theory that he was engaging in concerted activity. In any event, when he eventually received the document during his second meeting, discussed later in this decision, he admitted it was unhelpful because it said

[2] There was some testimony from Garza and Torres that, at one point, they were told by de la Cruz not to do the 30-minute wait after a lightning strike. That testimony is not credible. At least as to Garza, such testimony is also inconsistent with his testimony, cited above in text, that he was never ordered to work through lightning strikes. I also do not believe Garza's suggestion that Respondent did not have a protocol about lightning strikes. This is contrary to other record testimony and implausible in all the circumstances. Despite what Garza and Torres were allegedly told, they adhered to the 30-minute rule. See Tr. 43-47, 130-131. Nor is there any evidence that Garza complained to management officials about not being permitted to wait 30 minutes after lightning strikes. In fact, during his first of two visits to the administration building, Garza was permitted to wait out what he viewed as remaining time in the 30-minute rule before he left the building. Tr. 49-50.

nothing about lightning. Nevertheless, even assuming that Garza wanted the EPA document to clarify what to do during lightning strikes, he and the other employees clearly knew what to do during lightning strikes, that is, to follow the OSHA and Respondent protocols. And they did so. In these circumstances, I cannot view Garza as a reliable witness on any issue of significance in this case, unless it is against interest or corroborated by other evidence or circumstances.[3]

Later, after a short period at his work site, Garza again asked to be taken to the administration building, hoping, as he testified, to get some clarification about his concerns and to obtain the EPA document he had requested earlier. Tr. 51. This second visit took place at about "11:30 ish," according to Garza. Tr. 51. But it is unclear, even from Garza's own testimony, what he actually told management officials at this second meeting. His stated purpose—to get some clarification about his concerns—is too vague for a fact finding as to what he actually told management officials. This much is clear, however: Garza wanted to go home and he told Henry that he wanted to go home because he himself felt unsafe. Garza did not mention other employees in this context. Nor did he specifically talk about lightning during this second visit to the administration building. Tr. 51-57, 79-80. Indeed, it appears that the lightning strikes and the bad weather had abated by this point.[4]

Garza admitted that Henry asked him three times if he still wanted to go home and he replied, "Yes, I don't feel safe." Tr. 57. See also Tr. 218. At that point he was discharged.[5]

It is undisputed that Garza did not return to his work site after that second trip to the administration building. He was terminated for his failure to do so, which Respondent considered insubordination. The termination was memorialized in a document given to Garza when he was discharged. G.C. Exh. 5. Walter followed what took place during Garza's second visit to the administration building because he was on the phone with Henry and Salena and gave instructions for the discharge. Tr. 102-105.

[3] Walter did not speak directly to Garza during this visit, although he did testify that he spoke with Salena and could overhear what Garza was saying to her. Walter testified that Garza was complaining about the rain. Tr.100-101. His testimony on this point has the ring of truth because Garza was not wearing company-issued raingear on June 1 (Tr. 125-126, 211-215). But Walter's testimony is somewhat compromised because, at times, he seemed to confuse or conflate the two Garza visits to the administration building. See Tr.102-103, 97, 138-140. Thus, even though I viewed Walter as mostly a forthright witness and much more reliable than Garza, I cannot fully credit all of Walter's testimony.

[4] In answer to a question as to whether the last lightning strike in the area occurred at 10 am, Garza was unable to testify as to the time of the last lightning strike on June 1. Tr. 73. However, as discussed more fully hereafter, employee Guerra had his own meeting at the administration building at 11am. At the conclusion of that meeting, according to Guerra, the bad weather had "passed" and he went back to his work site. Tr. 196.

[5] During this second trip to the administration building, Garza was actually given the EPA document he requested during his first trip but had not received. According to Garza, he wanted to see it but he did not need it because he was going home. He also testified that the document was not helpful because it said nothing about lightning and thunder. Tr. 56-57, G.C. Exh. 5.

Although Garza did not dispute the immediate circumstances surrounding his discharge, as described above, he did try to put it in a context that I found completely incredible, especially in view of earlier examples of his unreliability as a witness. Garza testified that, in a conversation outside the administration building prior to his discharge, he was told by Henry that he could go home without any repercussions. He also claims that a sound video tape introduced in evidence as G.C. Exh. 6 confirms his testimony. First of all, the video is barely understandable and I cannot conclude that it supports Garza's testimony in this respect. My assessment of the video is that it shows only that Garza was pleading for no repercussions for his decision to go home, not that Henry agreed to those pleas. Nor does Garza's testimony make sense. Why would Henry commit to no repercussions when he not yet received instructions from Walter, who was intimately involved in the issues that day? In any event, the earlier conversation between Henry and Garza, even if it happened as Garza testified, is irrelevant in view of what happened later. Garza testified that, after the conversation shown on the video, Henry again approached and talked to him. This was after Henry had talked to Walter and received instructions on how to handle the situation. Walter was of course the only person with the authority to fire employees. According to Garza, Henry, with his cell phone to his right ear, again asked Garza if he wanted to go home and Garza said he did because he felt unsafe. It is obvious from all the circumstances that Henry was at this point speaking with Walter. Henry then told Garza that he was fired. Tr. 57. Walter credibly confirmed that these were his instructions and that the discharge was based on Garza's refusal to return to his work site after being asked to do so. Tr. 102-105, 143-144, 151. Neither in answer to Henry's question nor at any time thereafter did Garza agree to go back to his work site, where, as before, he would have been permitted to utilize the 30-minute rule as it applied to nearby lightning strikes.

The Separate Complaint of Employee Guerra

Employee Javier Guerra testified that he was inspired himself to visit the administration building because of a communication from Garza after Garza's first visit. Tr. 178-179. Guerra's visit took place at about 11 am. Tr. 192. According to Guerra, after his visit, he and Garza talked about it. Tr. 183-184. Significantly, however, nothing in the testimony of Garza or Guerra shows that either mentioned the other in their communications with management during their separate visits to the administration building.

According to Guerra, when he arrived at the administration building, he spoke first to Salena to complain about the weather conditions. She then turned the phone over to Walter, who spoke directly to Guerra. Guerra testified that he told Walter "I did not feel safe" in the area he was working, mentioning particularly lightning strikes and flooding in certain areas. Tr. 180. Actually, Guerra had followed Respondent's protocol during lightning strikes earlier that morning. He testified that he "was told to wait on stand-by due to a confirmed lightning strike within a mile." Tr. 176. In their telephone conversation, Walter assured Guerra that there was no problem with safety and he directed that the flooded areas be remediated by filling them with rocks. Tr. 181,195-196. Walter also told Guerra that, if he felt unsafe, he could go home. Tr. 181. Guerra

further testified that he did not mention to Walter the concerns of his fellow employees. Tr. 181.[6]

After his conversation with Walter, Guerra returned to his work site. According to Guerra, he was concerned that, if he left and went home, he might be considered to have quit or been terminated. Tr. 181-183. But he also testified that, by then, the "weather had already passed, so I decided to return to work." Tr. 196. He remained at his work site for "less than half an hour." Tr.187. Then, after learning about Garza's discharge, he, Guerra, made a voluntary decision to quit his employment in sympathy with Garza. Tr. 185, 197. There is no allegation that Respondent's treatment of Guerra on June 1 violated the Act.

B. Discussion and Analysis

The Discharge of Employee Garza

It is well settled that an employer violates Section 8(a)(1) of the Act if it disciplines or discharges an employee for asserting his or her right, under Section 7, to engage in concerted activity for the purpose of mutual aid and protection. Activity is "concerted" if it is engaged in with or on behalf of other employees and not solely by and on behalf of the employee himself or herself. The activity of a single employee may be concerted if it seeks "to initiate or induce or to prepare for group action" or brings "truly group complaints to the attention of management." *Marburn Academy Inc*., 368 NLRB No. 38, slip op. 10 (2019), citing numerous authorities. See also *Alstate Maintenance, LLC,* 367 NLRB No. 68, slip op. 8 (2019) (Even if concerted, for it to be protected, the employee's activity must also be for the purpose of "mutual aid and protection.").

The above calls for a two-step analysis: The first question to be answered is whether the employee did engage in protected concerted activity. If that is answered in the affirmative, the second question to be answered is whether the employer did indeed discharge the employee for that unlawful reason.

Garza Was Not Engaged in Concerted Activity for Mutual Aid and Protection

There is no doubt that the employees were concerned about the weather, including lightning strikes, on the morning of June 1. They talked about the weather but took no position as to what to do about it, except to inform themselves about the 30-minute rule concerning lightning strikes. That rule was consistent with Respondent's protocol about lightning strikes. It is also clear that, after the safety meeting, the employees reported to their work sites. While there, they were permitted to wait the allotted 30 minutes for the lightning to abate before undertaking their unloading duties outdoors. They remained inside vehicles until it was safe to return outside to work. Only Garza and Guerra made individual complaints to management about the weather conditions in separate visits to the administration building. But all other employees

[6] Walter's testimony does not vary much from Guerra's account. The main difference is that Walter testified that Guerra's main–indeed, only—concern was the flooding in his work area.

continued to work at their work sites, adhering to the 30-minute rule when lightning strikes appeared nearby, as did Garza and Guerra when they were at their work sites.[7]

It is clear that, during both of his visits to the administration building, Garza was concerned only with his own perceived safety. He never mentioned to management officials that he was speaking on behalf of other employees. Indeed, as he admitted, in his second visit, Garza specifically told a management official that he wanted to go home because he himself did not feel safe. It is hard to determine, on this record, what might have been Garza's particularized safety concern beyond a general concern about the weather and his desire to obtain the EPA document because his testimony on the point was not clear. But assuming his concern included lightning strikes, he had regularly stopped his outdoor work for 30 minutes after lightning strikes and, as he admitted, he was never ordered to work during lightning strikes. But there is no doubt that he was concerned only about his own safety. Neither his complaint, whatever it was, nor his refusal to return to his work site after his second visit to the administration building came within the definition of concerted activity for the purpose of mutual aid and protection. Whatever he did or complained about was not a group action; nor was it an effort to initiate or induce group action. It was only a personal action on behalf of Garza alone and thus unprotected. See *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. 2-3 (2019); and *NLRB v. Deauville Hotel*, 751 F.2d 1562, 1570-1571 (11th Cir. 1985).

Garza's refusal to return to his work site after his second visit to the administration building was also akin to a partial strike, which is, of course, unprotected. Garza wanted to go home at midday but did not remain at or return to his work site, as did Guerra before he quit his employment. Garza wanted to determine for himself whether the weather was good enough for him to do his work, thus attempting to set his own working conditions. That is not permitted. As the Board has stated, "[employees] cannot pick and choose the work they will do or when they will do it. Such conduct constitutes an attempt by the employees to set their own terms and conditions of employment in defiance of their employer's authority to determine those matters and is unprotected." *Audubon Health Care Center,* 268 NLRB 135, 137 (1983).

Garza was not Discharged for Engaging in Protected Concerted Activity

My finding above that Garza was not engaged in protected concerted activity when he was fired essentially ends the matter. However, I will turn to the second question in case the Board disagrees with my finding in that respect. This part of the case basically presents an issue of motivation—was Garza actually discharged for engaging in protected concerted activity. Such cases are analyzed under the dual motive causation test set forth in *Wright Line*, 251 NLRB 1083 (1980), enf'd on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in

[7] The overwhelming evidence is that all employees uniformly followed the 30-minute rule, which was part of Respondent's required protocol. This refutes the suggestions of Garza and Guerra to the effect that Respondent had no plan on dealing with lightning strikes, which was allegedly the basis of their separate complaints.

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). See also *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. 7 (2019). Under *Wright Line,* the General Counsel must satisfy an initial burden of showing by a preponderance of the evidence that the employee's protected activity was a motivating factor in a respondent's adverse action. If the General Counsel meets that initial burden, the burden shifts to the respondent to show that it would have taken the same action even absent the employee's protected activity. See *Hard Hat Services, LLC,* 366 NLRB No. 106, slip op. 7 (2018), and cases there cited.

Applying the above principles, I find that the General Counsel has failed to meet the initial burden of showing that the Respondent discharged Garza for engaging in protected concerted activity. First of all, it is clear that nothing in Garza's first visit to the administration building motivated his discharge because he was permitted to return to his work site thereafter with no repercussions. Nor is there is any evidence that Garza was discharged for talking to other employees about safety concerns or bringing them to the attention of management, as the complaint alleges. Significantly, there is no discrete evidence of animus on the part of Respondent against protected concerted activity—that is, employees banding together to bring group complaints to the attention of management. In fact, Respondent fully considered and tried to resolve the individual complaint brought by Garza, as it did with that brought by Guerra.

Nor did the General Counsel persuasively establish that Respondent knew about the alleged concerted nature of Garza's complaint. Neither of Garza's visits to the administration building would suggest that he was making a concerted complaint. The General Counsel attempts to establish such knowledge because Walter admitted that Guerra told him during his separate visit to the administration building that he "had been approached by [Garza] looking for corroboration before his complaint." See G.C. Br. 13, 16. But Guerra testified that he did not, in his discussion with Walter, "bring up any concerns" that his fellow employees may have had. Tr. 181. In any event, while Guerra's conversation with Garza prior to his visit to the administration building might be relevant to possible knowledge of concertedness in Guerra's complaint, it cannot establish knowledge of concertedness in Garza's complaint. Guerra was not discriminated against and his visit came after Garza's first visit and before Garza's second visit. Significantly, Garza never mentioned Guerra or any other employee in either of his visits to the administration building. Indeed, during his second visit and immediately before his discharge, Garza admittedly told Henry that he was concerned only with his own safety, thus confirming the lack of knowledge by Respondent of any concertedness prior to Garza's discharge.

Finally, there is no real causal connection between any alleged concertedness in Garza's weather complaint, such as it may have been, and his discharge. Garza was fired for refusing to return to his work site when directed to do so and not for making whatever complaints he made about the weather. But, even if there were a causal connection between the discharge and Garza's concern about the weather, it was about his own concern and not concern with or on behalf of others. In these circumstances, the General Counsel has not shown that the discharge was based on Garza's alleged

concerted complaint or because it was advanced for the mutual aid and protection of employees other than himself.[8]

If it were necessary to reach the issue, I would also find that, even if the General Counsel had met the initial burden of showing discrimination on the basis of concerted protected activity, the Respondent has met its burden of showing that it would have discharged Garza in any event. It is clear that, unlike Torres, Guerra and the other employees, Garza remained at or outside the HR department far from his work site, where the unloaders were working and following protocol in the event of nearby lightning strikes, most of which had abated by the time Garza refused to go back to his work station. Garza made clear that he wanted to go home. Thus, Garza abandoned his job and by refusing to return to his work site he was insubordinate, as Respondent properly concluded.

Conclusion of Law

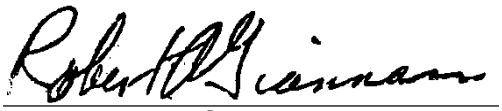
Respondent has not violated Section 8(a)(1) of the Act by discharging employee Luis Garza.

On these findings of fact and conclusion of law, and on the entire record, I issue the following recommended[9]

ORDER

The complaint herein is dismissed in its entirety.

Dated at Washington, D.C. March 5, 2021.



Robert A. Giannasi
Administrative Law Judge

[8] The General Counsel's assertions (G.C. Br. 17) that the timing of the discharge shows animus and that the reason given by Respondent was a pretext are without merit. The timing of the discharge was immediately after Garza's refusal to return to his work site and the reason given was not a pretext—it was the real reason for the discharge.

[9] If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.